Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa (M) Securities Bhd and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCC)-89 OF 2011 AND W-02–485 OF 2010
RAMLY ALI, ZAHARAH IBRAHIM AND AZIAH ALI JJCA
16 AUGUST 2012

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Companies and Corporations — Directors — Duties — Obligations of director to comply with Bursa Malaysia's Listing Requirements ('LR') — Whether directors discharged their obligations under LR — Whether appellants/directors were in breach of LR — Whether respondent had filed its application for various orders in OS in court through proper procedure — Capital Markets and Services Act 2007 s 360(1)(c)

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Words and Phrases — 'appears' — Whether use of 'appears' instead of 'proved' indicated lower standard of proof — Capital Markets and Services Act 2007 s 360(1)(c)

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The appellants were at all material times the directors of Cepatwawasan Group Bhd, a company listed on the Bursa Malaysia Securities Bhd ('the respondent'), a stock exchange vested with statutory functions under the Capital Markets and Services Act 2007 ('CMSA') to ensure an orderly and fair market in the securities traded through its facilities. As directors of a listed company, the appellants were bound by the terms of the respondent's listing requirements ('LR'). On 12 July 2005 the respondent issued a notice to show cause to the appellants for alleged breaches of the LR. Shortly prior to their removal as directors of Cepatwawasan, the appellants had caused Prolific Yield Sdn Bhd, a wholly owned subsidiary of Cepatwawasan, to make payments totaling RM16m to Opti Temasek and one Sheikh Abdul Rahim ('Sheikh'), the first appellant's driver. The respondent contended that the act of Prolific Yield Sdn Bhd, in which the first and second appellants were the only directors, in paying out RM16m as loans or advances constituted a breach of para 8.23 of the LR. Although the appellants failed to attend the initial hearing before Bursa's Listing Committee ('the LC') in respect of these breaches, the LC held that the appellants had breached the LR. Consequently the LC ordered the first and second appellants to pay a fine of RM1m each and the third and fourth appellants a fine of RM500,000 each to the respondent. In addition, the first and second appellants were also ordered to jointly and severally restore to Cepatwawasan the RM13m paid to Opti Temasek and the RM3m paid to Sheikh. The appellants appealed to the Appeals Committee ('the AC') against the decision of the LC but the AC dismissed the appellant's appeal. The

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respondent then filed an originating summons ('the OS') to seek the court's orders to enforce its penalties against the appellants pursuant to ss 360(1), (J) and (K) of the CMSA and/or the inherent jurisdiction of the court. The appellants' opposed this application on, inter alia, the grounds that the respondent could not rely on s 360(1) of the CMSA to enforce administrative actions taken by the respondent's domestic body, i.e. the LC, and that only the Securities Commission ('the SC') could bring the present action against the appellants. The appellants submitted that the respondent should have first brought an original action against all of them and proved that the appellants had breached the LR or any provisions of the CMSA. The High Court found that s 360(1)(c) of the CMSA allowed the respondent to file the present action and thus granted the respondent the orders it sought under the OS. This was the appellants' appeal against those orders granted by the High Court.

Held, dismissing the appeal with costs of RM20,000:

(1) Even though Prolific Yield Sdn Bhd was only a subsidiary of Cepatwawasan and by itself not a listed company, under para 16.10 of the LR a breach by a subsidiary of a listed company was deemed a breach by the listed company itself. Thus, in the present case the LC of the respondent had correctly founded that Prolific Yield Sdn Bhd had lent or advanced RM16m to Opti Temasek and Sheikh in contravention of para 8.23 of the LR. Further, by virtue of paras 16.10 and 16.11 of the LR, all the appellants as directors of Cepatwawasan at the material time were liable for the breach. It was on the strength of these provisions of the LR that the respondent through its LC and later AC imposed the penalties on the appellants. As such, the respondent had filed its application for the various orders in the OS in court through the proper procedure, ie under s 360(1)(c) of the CMSA (see paras 32–38, 67).

(2) The appellants' suggestion that the respondent had to first commence an action in a court of law against them and produce evidence to prove that they were guilty of the breach of the relevant requirements, before invoking the order under s 360(1)(c) of the CMSA had no merit. The trial judge rightly found that the use of the word 'appears' in s 360(1)(c) of CMSA instead of 'proved' indicated a lower standard of proof. The court acting under s 360(1)(c) was therefore called upon to determine the facts of a breach of the LR by a lower standard of proof, which did not equate to certainty by strict proof. In the present case the phrase indicated a state of mind of the court as to the affidavit evidence presented before it in order to arrive at or be satisfied of a conclusion that there had been a breach of the relevant requirements of the LR and that the breach was committed by the appellants. Thus, the trial judge had applied the correct test in granting the various orders prayed for by the respondent (see paras 44–50).

(3) In the present case the respondent had a statutory duty to act in the public interest under s 11 of the CMSA. Public interest was best served by the respondent directing the return of the monies paid out in breach of the LR (see paras 65–66).

[Bahasa Malaysia summary

Perayu-perayu pada setiap masa matan merupakan pengarah-pengarah Cepatwawasan Group Bhd, sebuah syarikat tersenarai di Bursa Malaysia Securities Bhd ('responden'), bursa saham yang diberikan fungsi-fungsi statutori di bawah Akta Pasaran Modal dan Perkhidmatan 2007 ('APMP') bagi memastikan pasaran yang teratur dan adil dalam sekuriti-sekuriti yang didagang melalui kemudahan-kemudahannya. Sebagai pengarah-pengarah syarikat tersenarai, perayu-perayu terikat dengan terma-terma keperluan senarai responden ('KS'). Pada 12 Julai 2005 responden telah mengeluarkan notis untuk tunjuk sebab kepada perayu-perayu kerana dikatakan melanggar KS tersebut. Sejurus sebelum pelucutan mereka sebagai pengarah-pengarah Cepatwawasan, perayu-perayu telah menyebabkan Prolific Yield Sdn Bhd, sebuah subsidiari milik penuh Cepatwawasan, untuk membuat bayaran-bayaran berjumlah RM16 juta kepada Opti Temasek dan seorang bernama Sheikh Abdul Rahim ('Sheikh'), pemandu perayu pertama. Responden berhujah bahawa tindakan Prolific Yield Sdn Bhd, yang mana perayu-perayu pertama dan kedua hanyalah pengarah-pengarah, dengan membayar RM16 juta sebagai pinjaman atau pendahuluan membentuk pelanggaran perenggan 8.23 KS tersebut. Walaupun perayu-perayu telah gagal menghadiri perbicaran awal di hadapan Jawatankuasa Senarai Bursa ('JS') berkaitan pelanggaran-pelanggaran tersebut, JS tersebut memutuskan bahawa perayu-perayu telah melanggar KS tersebut. Berikutan itu JS tersebut telah memerintahkan perayu-perayu pertama dan kedua untuk membayar denda RM1 juta setiap seorang dan perayu-perayu ketiga dan keempat dendan RM500,000 setiap seorang kepada responden. Tambahan, perayu-perayu pertama dan kedua juga diperintahkan bersama dan berasingan memulang kembali kepada Cepatwawasan sejumlah RM13 juta yang telah dibayar kepada Opti Temasek dan sejumlah RM3 juta yang telah dibayar kepada Sheikh. Perayu-perayu telah merayu ke Jawatankuasan Rayuan ('JR') terhadap keputusan JS tetapi JR telah menolak rayuan perayu. Responden kemudian telah memfailkan saman pemula ('SP') untuk mendapat perintah-perintah mahkamah menguatkuasakan penalti-penaltinya terhadap perayu-perayu menurut ss 360(1), (J) dan (K) APMP dan/atau bidang kuasa sedia ada mahkamah. Perayu-perayu membantah permohonan ini atas, antara lain, alasan bahawa responden tidak boleh bergantung kepada s 360(1) APMP untuk menguatkuasakan tindakan-tindakan pentadbiran yang diambil oleh badan domestik responden, iaitu JS, dan hanya Suruhanjaya Sekuriti ('SS') boleh memulakan tindakan ini terhadap perayu-perayu. Perayu-perayu berhujah bahawa responden patut memulakan tindakan asal terhadap kesemua mereka dan membuktikan bahawa perayu-perayu telah melanggar SK tersebut

atau mana-mana peruntukan APMP. Mahkamah Tinggi mendapati bahawa s 360(1)(c) APMP membenarkan responden memfailkan tindakan ini dan oleh itu memberikan responden perintah-perintah yang dipohonnya di bawah SP tersebut. Ini adalah rayuan perayu-perayu terhadap perintah-perintah yang diberikan oleh Mahkamah Tinggi.

Diputuskan, menolak rayuan dengan kos RM20,000:

(1) Walaupun Prolific Yield Sdn Bhd hanya subsidiari Cepatwawasan dan dengan sendirinya bukan syarikat tersenarai, di bawah perenggan 16.10 SK tersebut mengatakan satu pelanggatan oleh subsidiari kepada syarikat tersenarai adalah dianggap pelanggarran oleh syarikat tersenarai itu sendiri. Oleh itu dalam kes ini JS responden dengan wajar mendapati Prolific Yield Sdn Bhd telah meminjam atau mendahulukan RM16 juta kepada Opti Temasek dan Sheikh yang bertentangan peranggan 8.23 SK tersebut. Bahkan, menurut perenggan-perenggan 16.10 dan 16.11 SK tersebut, semua perayu-perayu sebagai pengarah-pengarah Cepatwawasan pada masa matan adalah bertanggungjawab untuk pelanggaran tersebut. Berdasarkan peruntukan-peruntukan SK tersebut bahawa responden melalui JSnya dan kemudian JR tersebut mengenakan penalti-penalti ke atas perayu-perayu. Oleh itu, responden telah memfailkan permohonan ini untuk pelbagai perintah dalam SP di mahkamah melalui prosedur sewajarnya iaitu di bawah s 360(1)(c) APMP (lihat perenggan 32–38, 67).

(2) Cadangan perayu-perayu bahawa responden perlu memulakan dahulu tindakan di mahkamah perundangan terhadap mereka dan mengemukakan keterangan bagi membuktikan bahawa mereka bersalah kerana pelanggaran keperluan-keperluan yang relevan, sebelum menggunakan perintah di bawah s 360(1)(c) APM adalah tanpa merit. Hakim perbicaran sewajarnya mendapati bahawa penggunaan perkataan 'appears' dalam s 360(1)(c) APMP dan bukan 'proved' menunjukkan piawai pembuktian yang lebih rendah. Mahkamah bertindak di bawah s 360(1)(c) dengan itu dipanggil untuk menentukan fakta-fakta pelanggaran SK tersebut dengan piawai pembuktian yang lebih rendah, yang tidak sama dengan kepastian melalui bukti kukuh. Dalam kes ini frasa tersebut menunjukkan keadaan minda mahkamah berhubung keterangan afidavit yang dikemukakan di hadapannya bagi tujuan untuk tiba kepada atau berpuas hati dengan kesimpulan bahawa terdapat pelanggaran keperluan-keperluan relevan SK tersebut dan bahawa pelanggaran tersebut telah dilakukan oleh perayu-perayu. Oleh itu, hakim perbicaraan telah memohon ujian yang betul dengan memberikan pelbagai perintah-perintah seperti yang dipohon oleh responden (lihat perenggan 44–50).

(3) Dalam kes ini responden mempunyai kewajipan statutori untuk

bertindak demi kepentingan awam di bawah s 11 APMP. Kepentingan awam adalah terbaik diberi oleh responden dengan mengarahkan pemulangan semula wang yang telah dibayar yang merupakan pelanggaran SK tersebut (lihat perenggan 65–66).]

Notes

For cases on duties, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 226–248.

Cases referred to

Chan Ming Cheng v PP [2002] 3 MLJ 733, CA (refd)
Emmerton v University of Sydney [1970] 2 NSWR 633 (refd)
Patterson v Veitch (1956) 58 SRNSW 287 (refd)
PPv Law Say Seck & Ors [1971] 1 MLJ 199 (refd)
Pyare lal Bhargava v State of Rajasthan AIR 1963 SC 1094, SC (refd)
Tan Sri Dato' Haji Lamin bin Haji Mohd Yunus v Bursa Malaysia Securities Berhad [2012] 6 MLJ 182; [2012] 3 CLJ 837, CA (refd)

Legislation referred to

Capital Markets and Services Act 2007 ss 11, 11(2), (3), 354, 354(3)(b), (8),, 360, 360(1), (1)(b), (c), (J), (K), 13(b), 381(3), 390, 390(1), (2)
Evidence Act 1950 s 24
Rules of the High Court 1980 O 53 r 3
Securities Industries Act 1983 s 100

Appeal from: Originating Summons No D–24 NCC–168 of 2010 and Application for Judicial Review No R1–25–270 of 2006 (High Court, Kuala Lumpur).

Muhammad Shafee Abdullah (Nurul Atiqah Zaini with him) (Shafee & Co) for the appellants.
Lim Chee Wee (Skrine) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

[1] The appellants, at the material time, were directors of Cepatwawasan Group Bhd, ('Cepatwawasan') a company listed on the main board of the Malaysian stock exchange, Bursa (M). The respondent is Bursa (M) Securities Bhd which has a statutory duty pursuant to s 11 of the Capital Markets and Services Act 2007 ('CMSA') to ensure an orderly and fair market in the securities that are traded through its facilities.

[2] Shortly prior to their removal as directors of the company (Cepatwawasan) the appellants had caused the company's wholly owned

A subsidiary, Prolific Yield Sdn Bhd to make payments totaling RM16m to a company called Opti Temasek Sdn Bhd and an individual Sheikh Abdul Rahim (who, at the material time, was the driver of the first appellant, Tengku Dato Kamal Ibni Sultan Sir Abu Bakar).

B **[3]** Such payments were in breach of the financial assistance provisions in the respondent's listing requirements ('LR'). The respondent had on 12 July 2005 issued a notice to show cause against the appellants and fixed a date for hearing before the respondent's listing committee.

C **[4]** The appellants failed to attend the initial hearing before the Listing Committee on 13 October 2005. The Listing Committee proceeded with the hearing and made a finding that the appellants had breached section 16.11(a) of the listing requirements for causing Cepatwawasan to breach section 8.23(1) of the LR. At the material time, the first and second appellants were the only D directors of Prolific Yield.

[5] Consequently, the Listing Committee imposed the following penalties, namely:

E (a) the first and second appellants were fined RM1m each;

(b) the third and fourth appellants were fined RM500,000 each; and

(c) the first and second appellants were also directed to restore to Cepatwawasan the RM13m paid to Opti Temasek and the RM3m paid F to Sheikh Abdul Rahim.

[6] The appellants appealed to the Appeal Committee against the said order of the Listing Committee. However on 12 June 2006, the appeal was G dismissed. Consequently the penalties and directions of the listing committee stand. The appellants' application for judicial review was dismissed by the High Court on 18 January 2010.

[7] On 26 May 2010, the respondent filed the originating summons to seek H the court's orders to enforce its sanctions or penalties against the appellants pursuant to ss 360(1)(c)(i), 360(J) and 360(K) of the CMSA 2007 and/or the inherent jurisdiction of the court. In the said application the respondent sought the following orders:

I (a) that within 14 days of the date of this order, the first defendant (first appellant) pay the sum of RM1,000,000 to the plaintiff (respondent);

(b) that within 14 days of the date of this order, the second defendant (second appellant) pay the sum of RM1,000,000 to the plaintiff (respondent);

(c) that within 14 days of the date of this order, the third defendant (third appellant) pay the sum of RM500,000 to the plaintiff (respondent);

(d) that within 14 days of the date of this order, the fourth defendant (fourth appellant) pay the sum of RM500,000 to the plaintiff (respondent);

(e) that within 30 days of the date of this order, the first and second defendants (first and second appellants), jointly and severally, restore to Cepatwawasan Group Bhd the RM13,000,000 paid to Opti Temasek Sdn Bhd;

(f) that within 30 days of the date this order the defendants (the appellants), jointly and severally, restore to Cepatwawasan Group Bhd the RM3,000,000 paid to Sheikh Abdul Rahim bin Sheikh Hassan;

(g) that the plaintiff (the respondent) be at liberty to apply for the necessary directions for service of the order on the defendants (the appellants) and any extension of time for such service;

(h) that the plaintiff (the respondent) be awarded the costs of this application; and

(i) such further and/or other order as the court deems fit.

THE APPELLANTS' OPPOSITION TO THE ORIGINATING SUMMONS AT THE HIGH COURT

[8] The appellants (as the defendants at the court below) opposed the originating summons on three main grounds, namely:

(a) under s 360(1)(c) of the CMSA 2007, the respondent (as the plaintiff at the court below) must first bring an original action against all the appellants and prove that the appellants breached the LR or any of the provisions under the CMSA 2007 or the repealed legislation (the Securities Industries Act 1983 and the Financial Industries Act 1993) which survive the amendment; and not merely to enforce the administrative reprimands or actions taken by the respondent's domestic body such as the listing committee;

(b) only the Securities Commission (SC) can bring the present action, as s 354 of the CMSA 2007 applies to the SC only, and not to the respondent. Citing s 354(8) of the CMSA 2007, the appellants contended that if the SC gives directions, then the SC can come under s 360(1)(b) of the CMSA to enforce it, but not the respondent.

(c) the third ground by the appellants is that there is transitional provision in s 390(2) of the CMSA 2007 which provides that the acts committed

under the repealed legislation survive the repeal for the purpose of enforcement of rights etc. It was argued that the alleged breaches were committed under the LR but caught by the repealed legislation; so it was submitted that the respondent must come under those repealed provisions of the repealed legislation. Learned counsel for the appellants in particular referred to s 100 of the repealed Securities Industries Act (SIA) 1983 which is similar to s 360 of the CMSA 2007. It was also argued that s 360 of the CMSA 2007 makes no mention of any penalties. Therefore the appellants contended that it is the SC that can enforce any penalties and the SC recovers it by way civil debt.

[9] In addition, the learned counsel for the appellants also raised the issue of duplicity of proceedings. He argued that the company, Cepatwawasan Group Bhd had entered into a consent judgment with the first to fourth appellants and 14 others in the Kuala Lumpur High Court Suit No D22-1168 of 2004 where the first to fourth respondents and 14 others had agreed to return to the said company a sum of RM3m.

[10] On 28 December 2010 the High Court granted the orders sought under the present originating summons. The present appeal before us is against the said orders granted by the High Court.

[11] In allowing the respondent's application the learned High Court judge held, inter alia, that:

(a) the court has the powers to deal and grant the orders sought by the respondent under s 360(1)(c) of the CMSA 2007; and the existing s 360(1)(c) of the CMSA 2007 allows the respondent to file the present action;

(b) that s 354 of the CMSA 2007 as cited by the appellants deals with an entirely different matter; that section applies if the SC imposes penalties; and under s 360(1)(c) of the CMSA 2007 it is to be noted that both the SC as well as the respondent may take action and impose penalties to ensure compliance with the relevant requirements;

(c) that the CMSA 2007 (which came into effect in 2007) is applicable to the respondent's action even though the alleged breaches occurred in 2005 on the ground that s 390 of the CMSA 2007 preserves the right of the respondent to take action against any person liable to be prosecuted or punished for offences or breaches committed under the repealed legislation (the Securities Industry Act 1983) before the commencement of the CMSA 2007 since the liability of such person under the repealed legislation is not affected by the repeal; and

(d) that the respondent's action is a fresh proceeding, and not about accrued

rights; it is clearly a separate action from the civil action by Cepatwawasan to recover monies belonging to the company, which has been resolved and compromised by way of a consent judgment; and therefore there cannot be any duplicity of proceedings, as contended by the appellants.

THE FACTUAL BACKGROUND

[12] Cepatwawasan is a public listed company and at the material time, the appellants were the directors of Cepatwawasan. Prolific Yield is a wholly-owned subsidiary of Cepatwawasan. At all material time, the first and second appellants were the directors of Prolific Yield.

[13] On 1 July 2004, the first and second appellants passed a Prolific Yield directors' circular resolution to authorise Prolific Yield to enter into an agreement with Opti Temasek, inter alia, for Opti Temasek to supply to Prolific Yield fresh fruit bunches of oil palm products. On or about 2 July 2004, Prolific Yield executed an agreement with Opti Temasek dated 2 July 2004 where Prolific Yield was to, inter alia, provide to Opti Temasek a loan or advance from time to time at Prolific Yield's sole and absolute discretion. The first and second appellants, on behalf of Prolific Yield, had signed the agreement. From 8–13 July 2004, Prolific Yield paid a total sum of RM13m to Opti Temasek.

[14] On 5 August 2004, the appellants passed a directors' circular resolution of Cepatwawasan to approve Prolific Yield's advance of the sum of RM3m to Sheikh Abdul Rahim. This sum of RM3m was then paid out to him. On 6 August 2004, the appellants were removed as directors of Cepatwawasan.

[15] On 12 July 2005, the respondent issued notices to show cause by way of AR registered post to Cepatwawasan pursuant to para 8.23(1) of the LR and to all the appellants pursuant to para 16.11 of the same. The notices issued to the first, second and fourth appellants were returned with the acknowledgment of receipt. The notice issued to the third applicant was not returned. The appellants did not reply to the said notices.

[16] On 13 October 2005, the listing committee of the respondent had decided, inter alia, that the appellants had breached para 16.11(a) of the LR for causing Cepatwawasan to breach para 8.23(1) of the LR. Various penalties were imposed on the appellants. The listing committee's decision was communicated to Cepatwawasan and to the appellants through letters and a press release all dated 27 October 2005.

[17] On 11 November 2005, the appellants' solicitors wrote to the respondent requesting for, inter alia, a copy of all documents and correspondences and also sought for an extension of time for the appellants to appeal against the listing committee's decision. On 17 November 2005, the respondent issued a letter to the appellants' solicitors that in accordance with the enforcement procedures, any appeal must be submitted within a period of seven days from the date of the notification of the decision failing which the appeal shall not be considered by the respondent. The respondent nonetheless advised the appellants' solicitors to submit the appellants' appeal by 25 November 2005 for the appeals committee to decide as to whether the appeal filed out of time will be considered. On 25 November 2005, the appellants' solicitors issued a letter to the respondent setting out the grounds of the appellants' appeal as well as requesting for an oral hearing of the appeal.

[18] On 12 June 2006, the Appeals Committee heard the appeal from the appellants, where all four appellants were present with their respective solicitors. The appellants' counsel made submissions on behalf of the appellants before the Appeals Committee. Having considered the facts and circumstances of the case, the appeals committee dismissed the appeals by the appellants.

[19] On 14 August 2006, the appellants filed the judicial review proceedings against the respondent wherein the appellants applied for leave to initiate judicial review proceedings under O 53 r 3 of the Rules of the High Court 1980. On 18 January 2010, the application for leave was dismissed with costs. The appellants are appealing against this decision.

[20] On 26 May 2010, the respondent filed the present originating summons to seek orders to enforce its sanctions. On 28 December 2010, the High Court granted the orders sought under the originating summons. To date, the appellants have not complied with those orders.

[21] The present appeal before us is against the decision of the learned judge in granting the respondent's application for the said orders.

SECTION 360 OF THE CMSA 2007

[22] Section 360(1)(c) of the CMSA 2007 provides statutory provisions to allow the respondent, as a stock exchange, to apply for the court order to enforce its penalties. The relevant s 360(1)(c) provides:

> Power of Court to make certain orders
>
> 360 (1) Where -
>
> …

(c) on an application by an exchange holding company, a stock exchange, a futures exchange or an approved clearing house, as the case may be, it appears to the court that -

(i) any person has contravened a relevant requirement; or

(ii) any person has contravened a relevant requirement and that there are steps which could be taken for remedying the contravention or mitigating the effect of such contravention; or

the court may, without prejudice to any order it would be entitled to make otherwise than pursuant to this section, make one or more of the following orders:

…

(j) where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do any act or thing that he is required to do under a relevant requirement, an order requiring such person to do such act or thing;

(k) in a case of a contravention by a person of the rules of a stock exchange, a futures exchange or an approved clearing house, an order giving directions concerning compliance with or enforcement of those rules to —

(i) the person;

[23] The respondent is a recognised stock exchange under the CMSA 2007. Therefore, under sub-s (1)(c), the respondent is clearly entitled to make an application to the court for an order therein stated.

[24] The subject matter of s 360(1)(c) is 'the contravention of a relevant requirement' by any person. Section 360(13)(b) of the same Act provides:

(13) For the purpose of this section, 'relevant requirement' — (b) in relation to an application by the exchange holding company, a stock exchange a futures exchange or an approved clearing house, means a requirement which is imposed by or under the rules of the stock exchange, the futures exchange or approved clearing house, as the case maybe;

LISTING REQUIREMENTS (LR)

[25] The court has the power to make the various orders as set out in s 360 of the CMSA, including for the present purposes, an order requiring a person to do anything he is required to do under a relevant requirement and the giving of directions concerning compliance with or enforcement of the rules of the stock exchange.

[26] In order for the respondent to discharge its statutory duty to ensure an orderly and fair market in the securities that are traded through its facilities,

various rules and requirements are issued, monitored and enforced by the respondent; amongst them are the listing requirements (LR). The purpose of the LR, as stated in para 2.02 thereof, is to set out the requirements that must be complied with by all applicants, listed issuers management companies, trustees, their directors, officers or other persons to whom the LR are directed.

[27] The LR has statutory force in the form of rules containing obligations and requiring compliance by participating organisations pursuant to the relevant laws particularly the CMSA 2007. A listed issuer and its directors must comply with the LR for so long as the listed issuer shall remain on the official list of the stock exchange. These duties are owed not only to the respondent but also to the investing public. This has been stressed by the learned Low Hop Bing JCA, delivering the judgment of the Court of Appeal in the case of *Tan Sri Dato' Haji Lamin bin Haji Mohd Yunus v Bursa Malaysia Securities Berhad* [2012] 6 MLJ 182; [2012] 3 CLJ 837.

[28] Failure to comply with any of these requirements in the LR will amount to a breach in respect of which actions may be taken and/or penalties may be imposed (see para 2.02 of the LR).

[29] The appellants as the directors of Cepatwawasan, a listed company, are bound by the terms of the LR. Paragraphs 2.03(d)–(e) of the LR clearly provide that 'Directors, officers and advisers of listed issuers shall maintain the highest standard of integrity, accountability corporate governance and responsibility' and 'Directors of listed issuers shall act in the interests of the company as a whole, particularly where the public represents only a minority of the shareholders or where directors, or major shareholders have material interests in transactions entered into by listed issuers.'

[30] In the present case, the respondent contended that the act of Prolific Yield, which is a subsidiary of Cepatwawasan, in paying out the amount totaling RM16m to Opti Temasek and to Sheikh Abdul Rahim (a driver to the first appellant) as loans or advances over a period of time constituted a breach of the LR under para 8.3 relating to provision of financial assistance as found by the listing committee and affirmed on appeal by the appeal committee of the respondent.

[31] Paragraph 8.3 of the LR provides:

> (1) Except as otherwise prohibited under the Companies Act 1965 or any guidelines issued by the Commission or in relation to a foreign corporation, the relevant laws of the place of incorporation, a listed issuer or its unlisted subsidiaries may only:
>
> (a) lend or advance any money; or
>
> (b) guarantee, indemnify or provide collateral of a debt, (referred to as

'provision of financial assistance' in this Part 1) to or in favour of the following:

(i) directors or employees of the listed issuer or its subsidiaries, as the case may be, in such manner as may be permitted under the Companies Act 1965 or the relevant laws of the place of incorporation (as may be applicable);

(ii) persons to whom the provision of financial assistance is necessary to facilitate the ordinary course of business of the listed issuer or its subsidiaries, as the case may be, such as the provision of advances to its sub-contractors; or

(iii) the subsidiaries or associated companies of the listed issuer, the listed issuer (in the case of the subsidiaries providing the financial assistance) or its immediate holding company which is listed.

[32] Even though Prolific Yield is only a subsidiary of Cepatwawasan, by itself is not a listed company, a breach by a subsidiary of a listed company shall be deemed a breach by the listed company, itself. This is clearly provided for under para 16.10 of the LR.

[33] Under para 8.23(1) of the LR a listed company/issuer or its subsidiaries may only lend or advance money or guarantee, indemnify or provide collateral for a debt to or in favour of the persons or entities mentioned therein. Loans or advances made to other than the mentioned persons or entities are clearly in breach of the said LR.

[34] In the present case, the listing committee of the respondent had correctly founded that Prolific Yield, a wholly owned subsidiary of Cepatwawasan (a listed issuer) had lent or advanced RM16m to Opti Temasik and one Sheikh Abdul Rahim (who was a driver to the first appellant) in contravention of the said para 8.23(1) of the LR; and by virtue of paras 16.10–16.11 of the LR, all the appellants as directors of Cepatwawasan at the material times were liable for the breach. There is no indication to show that the lending or advancing of the money to these entities falls under any of the permitted acts under para 8.23(1) of the LR.

[35] All the appellants, being directors of Cepatwawasan at the relevant times were responsible of the said breach para 16.11 clearly provides that:

A director of listed issuer must not:

(a) cause, aid or abet a breach of these Requirements by such listed issuer; or

(b) permit, either knowingly or where he had reasonable means of obtaining such knowledge, a listed issuer to commit a breach of these Requirements.

[36] Under para 16.16 of the LR, *'in the event of any breach of these Requirements by any applicant, listed issuer, management company, trustee or its directors, officers or advisers or any other person to whom these requirements are directed, the exchange may take or impose such actions or penalties as it considers appropriate.'*

[37] Under para 16.17 of the LR, there are various penalties that can be imposed by the respondent on a listed company and its directors for any breach of the LR. These include issuance of caution letter, issuance of private or public reprimand, a direction to rectify the non-compliance, suspension of trading, delisting, imposition of fine not exceeding RM1m and any other action which the respondent may deem appropriate.

[38] On the strength of the above provisions of the LR, the respondent through its Listing Committee, and later affirmed by its Appeal Committee, directed the appellants to do the following:

(a) the first and second appellants were ordered to pay a fine of RM1m each to the respondent within 14 days of the date of the decision;

(b) that the third and fourth appellants were ordered to pay a fine of RM500,000 each to the respondent within 14 days of the date of the decision;

(c) that pursuant to para 16.17(b)(v) of the LR, the first and second appellants, within 30 days of the issuance of the respondent's letter, jointly and severally, restore to Cepatwawasan the RM13m paid to Opti Temasek; and

(d) that pursuant to para 16.17(b)(v) of the LR, all the appellants, within 30 days of the issuance of the respondent's letter, jointly and severally, restore to Cepatwawasan the RM3m paid to Sheikh Abdul Rahim.

[39] The power of the court to make an order under s 360(1) of the CMSA 2007 can only be invoked if 'it appears to court that any person has contravened a relevant requirement.' The phrase 'it appears to the court' as found sub-s (1)(c) is not defined anywhere under the CMSA 2007 or the Evidence Act 1950.

[40] Learned counsel for the appellants submitted that s 360 of the CMSA 2007 cannot apply as the purported contravention was 'already' found by the respondent's Listing Committee as in the present case. To the appellants, the provisions of s 360(1)(c) can only apply when the respondent is seeking at first instance for the court to order that the appellants have contravened the requirements under the LR; and for that purpose, the court under the said section will have to hear and determine if there is a contravention of the LR.

The appellants further argued that in order to invoke the order under s 360(1)(c), the court must make a finding of fact based on witness testimony brought before the court that the appellants have breached the requirements under the LR. The appellants did not concede to the fact that the word 'appears' denotes a lower standard than 'proved'; to the appellants it denotes 'onus of the court' and does not extinguish the court's function in determining whether the appellants have contravened the relevant requirements of the LR. The appellant argued that the court must first determine whether the respondent has come before the court under the correct provision of the law to enforce the penalties imposed by the respondent's Listing Committee.

[41] Learned counsel for the appellants suggested that the respondent must first commence an action in a court of law against the appellants and produces evidence to prove that the appellants are guilty of the breach of the relevant requirements; and then, only then, the respondent can come to court under s 360(1)(c) to apply for the necessary orders to enforce any penalty imposed on the wrongdoers.

[42] Learned counsel for the respondent submitted that the word 'appears' clearly denotes a lower standard than 'proved'.

[43] The learned High Court judge did not accept the said suggestion by the counsel for the appellants. The learned High Court judge agreed with the position taken by the respondent that the word 'appears' in s 360(1)(c) of the CMSA 2007 denotes a lower standard than the word 'proved'. In rejecting the appellants' suggestion, the learned High Court judge opined:

> That is not, in my opinion, what is contemplated under the provision of s 360(1)(c) CMSA. I have come to that conclusion because under the relevant provisions as to the powers and authority of the listing committee in the CMSA 2007, the listing committee has the necessary jurisdiction to conduct its own investigation or inquires and to find for itself whether or not the defendants have committed the breach. And, on so be satisfied of the breach, to impose any necessary penalty or reprimand provided under the Act. If the defendants failed to comply with any direction or order made by the listing committee (after having exhausted the in house appeal process) the SC or the plaintiff, as the case may be, may then come to court to apply under s 360 CMSA for the necessary order to enforce compliance.

[44] We agree with the submission of learned counsel for the respondent as well as the finding of the learned High Court judge on this point, that the use of the word 'appears' in s 360(1)(c), instead of 'proved' indicates a lower standard of proof. The deliberate absence of the word 'proved' in that section should be taken to mean that the court should not have to require strict proof or be satisfied beyond doubt when making findings of fact on breach of the LR pursuant to s 360(1)(c). Instead the word 'appears' is used in the provision; and

this should be seen to allow room for and a reasonable margin or probabilities. The court acting under s 360(1)(c) is therefore called upon to determine the facts of a breach of the LR by a lower standard of proof, which does not equate to certainty by strict proof.

[45] As stated earlier, the word 'appears' is not defined either in the CMSA 2007 or the Evidence Act 1950. However the phrase 'appears to the court' is found in s 24 of the Evidence Act 1950 in relation to voluntariness of a confession by an accused person. Section 24 provides:

> 24. A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of the temporal nature in reference to the proceeding against him.

[46] In interpreting the phrase, Sharma J (as he then was) in the case of *Public Prosecutor v Law Say Seck & Ors* [1971] 1 MLJ 199 had said:

> whether any threat or inducement was offered in any particular case is a question of fact and has to be decided with reference to the circumstances of each case … it should be sufficient in the opinion of the court that he would get the advantage. It is left to the court entirely to form its own opinion as to whether an inducement, threat or promise held out in any particular case was sufficient to lead the person to suppose that he would gain an advantage of a temporal nature.

[47] The decision of the Supreme Court of India in the case of *Pyare lal Bhargava v State of Rajasthan* AIR 1963 SC 1094 on the interpretation of the word 'appears' in relation to s 24 of the Evidence Act, can be a good guidance for us here. In that case Subra Rao J had said:

> The crucial word in the first ingredient is the expression 'appears'. The appropriate meaning of the word 'appears' is 'seems.' It imports a lesser degree of probability than proof. Section 3 of the Evidence Act says:
>
> > A fact is said to be 'proved when after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.
>
> Therefore, the test of proof is that there is such a high degree of probability that a prudent man would act on the assumption that the thing is true. But under S 24 of the Evidence Act such a stringent rule is waived but a lesser degree of assurance is laid down as the criterion. The standard of a prudent man is not completely displaced,

> but the stringent rule of proof is relaxed. Even so, the laxity of proof permitted does not warrant a court's opinion based on pure surmise. A prima facie opinion based on evidence and circumstances may be adopted as the standard laid down. To put it in other words, on the evidence and the circumstances in a particular case it may appear to the court that there was a threat, inducement or promise, though the said fact is not strictly proved. This deviation from the strict standards of proof has been designedly accepted by the legislature with a view to exclude forced or induced confessions which sometimes are extorted and put in when here is a lack of direct evidence.

[48] The test is on a reasonable well founded belief based on some circumstances which arouse suspicion of the fact. A mere possibility is insufficient. This has been mentioned by Sharma J in the case of *Public Prosecutor v Law Say Seck & Ors* as follows:

> I have been told that the use of the word 'appears' in s 24 is very significant and the word 'proved' has purposely not been used by the legislature. I quite agree. A confession can, or course, be rejected on a valid ground or conjecture but there must be something before the court on which such a valid conjecture can rest. In this case I think there is sufficient evidence on which I can safely base a reasonably well founded belief in the hypothesis of a seeming inducement which avoids the confession under our laws. If the accused is able to point to some circumstances which arouse suspicion the confession cannot be admitted. A mere possibility that the confession was not voluntary is insufficient to warrant its rejection but a probability would suffice to dictate its rejection in evidence.

[49] The above passage was cited by Gopal Sri Ram JCA (as he then was) in the case of *Chan Ming Cheng v Public Prosecutor* [2002] 3 MLJ 733 when he said:

> What these passages amount to is this. There is no burden on an accused person to prove that the statement recorded from him is involuntary. The burden lies on the prosecution to show positively that the statement was voluntarily given. There is also no burden on an accused to raise a reasonable doubt as to the voluntariness of a cautioned statement. The only burden on an accused is to show suspicious circumstances surrounding the making of or recording of the cautioned statement. So long as the suspicion is reasonable as to the voluntariness of the statement, it is incumbent on the trial judge to hold it inadmissible.

[50] Based on the above propositions, we can safely conclude that the phrase 'it appears to the court' as found in s 360(1)(c) of the CMSA 2007 denotes a lower standard than 'proved'. In the present case the phase indicates a state of mind of the court as to the affidavit evidence presented before it in order to arrive at or be satisfied of a conclusion that there has been a breach of the relevant requirements of the LR and that the breach was committed by the appellants. The learned High Court judge had came to a correct finding in

A exercising his discretion under s 360(1)(c) of the CMSA 2007 in granting the various orders prayed for by the respondent and had applied the correct test in coming to the conclusion.

B **[51]** Learned counsel for the appellants contended that, as a whole, the respondent's recourse is not within s 360 of the Act. The CMSA 2007 provides power for enforcement of penalties only to the Securities Commission. The learned counsel cited that under s 354 of the CMSA 2007, it is the intention of the legislature to provide the mechanism of enforcement of penalties only to the Securities Commission and not the respondent.

C

[52] We cannot agree with the submission of the learned counsel for the appellants on this point. Section 354 of the CMSA 2007 as cited by the appellants deals with an entirely different matter. That section applies if the

D Securities Commission imposes its penalties. It allows the Securities Commission to take any necessary administrative actions for breaches of securities laws without going to court. Section 354(3)(b) of the Act allows for fines to be imposed by the Securities Commission and where there is a failure to pay such a fine, then court action will still be necessary, as s 354(8) of the

E same Act states that the penalty can be sued for and recovered as a civil debt.

[53] In the present case, the fines were imposed in accordance with the relevant listing requirements, by the respondent, as a stock exchange, not by the Securities Commission. Obviously, the provision of s 354 of the CMSA 2007

F is not applicable, if the respondent wishes to enforce the said penalties. Section 360(1)(c) clearly provides for such avenue for the respondent. It allows 'an application by an exchange holding company, a stock exchange a futures exchange or an approved clearing house as the case may be, if it appears to the court that any person has contravened a relevant requirement.'

G

[54] Learned author Shanti Geoffrey in her book *Capital Market Laws of Malaysia (2010)* shares the same view. At p 461, she states:

> H … there may be instances where it is necessary for the regulator to act in order to safeguard investors' assets, maintain market confidence or prevent a person who is not fit and proper from managing a corporation. Section 360 of the CMSA provides for a wide range of orders which the SC may seek from the court. This provision may also be relied upon by the stock exchange as well as an aggrieved person where there is a contravention of a relevant requirement.

I

[55] Alternatively, learned counsel for the appellants argued that the CMSA 2007 is not applicable to the respondents because the relevant legislation during the period of the enforcement action is the Securities Industries Act 1993 (SIA), which was repealed by the CMSA 2007 which came into effect on

28 September 2007; and the respondent's rights, which accrued in 2005 when the SIA was still in force, (if any) would remain in force as if the CSMA 2007 had not been enacted.

[56] The predecessor of s 360 of the CSMA 2007 was s 100 of the SIA, which was designed to deal with breaches of the law relating to dealing in securities. Section 360 of the CMSA 2007 which is substantially the same with s 100 of the SIA, came into effect on 28 September 2007 repealing the whole of s 100 of the SIA. On this issue, we are in agreement with the learned High Court judge when he said:

> In my view this submission or argument is misconceived. Section 390(1) of the CMSA preserves the right of the plaintiff to take action against any person liable to be prosecuted or punished for offences or breaches committed under the repealed legislations before the commencement of the CMSA 2007, since the liability of such person under the repealed legislations is not affected by the repeal. This is further fortified by the provision of sub-s (3) of s 390 of the CMSA 2007 which provides that remedy or investigation in respect of such right, privilege, obligation or liability shall not be affected by this Act (ie CMSA 2007) and shall continue to remain in force as if this Act had not been enacted. What is more important to note is that under s 381(3) of the CMSA 2007 it is provided that all decisions, directions or notifications made, given or done under the repealed legislations shall be deemed to have been made, given or done under or in accordance with the corresponding provisions of the CMSA 2007. Now, the corresponding section in SIA 1983 (one of the repealed legislations) was s 100. The defendant's counsel conceded, in para 3.15 of her written submissions in encl 9, that s 360 of the CMSA 2007 and s 100 of the SIA 1983 is substantially the same. In this case the plaintiff had taken action against the defendants and had imposed penalties on them in 2005. Thus by virtue of these two provisions ie ss 381(3) and 390 of the CMSA 2007 the action and the decision to impose penalties survive the repealed legislation as if they were made or imposed under s 360 of the CSMA 2007.

[57] That is the correct reading of the relevant provisions of the laws on the issue. We find no reason to disagree with him. We shall adopt the same reasoning on the same issue for the purpose of the present appeal before us.

[58] Learned counsel for the appellants also raised the issue of double recovery and the principles of 'accord and satisfaction' in the present appeal. It is not in dispute that on 14 August 2004 Cepatwawasan and Prolific Yield had instituted a suit against the first to fourth appellants and 14 other persons to claim for the return of the same RM16m paid to Opti Temasek and Sheikh Abdul Rahim in the Kuala Lumpur High Court suit No D-22–1168 of 2004 (1168 Suit). Subsequently a settlement order was recorded between the parties on 29 October 2010 whereby the first to fourth appellants together with 14 others were to pay RM3m as a final settlement sum in place of the RM16m

claim. As a result of the settlement the 1168 Suit was withdrawn without any admission as to liabilities against all parties.

[59] Learned counsel for the appellants contended that by principles of 'accord and satisfaction', the obligation to recover the RM16m to Cepatwawasan imposed by the respondent has been fully satisfied by the settlement order and therefore the appellants' obligations are thereby discharged.

[60] The learned High Court judge had extensively considered this issue in detail in his grounds of judgment. We have read and considered his views on this issue and we fully agree with the learned judge when he said:

> On this issue my view is that the court ought not to allow double recovery. Whether it is double recovery or otherwise depends on the facts and circumstances of each case. In this case, the plaintiff argued that consent judgment is irrelevant. This is because the plaintiff is enforcing the law in that the amount RM16m was wrongly advanced or loaned to the defendants who, at the material times, were the directors of the company Cepatwawasan. This sum belongs to the company and specifically all the shareholders of the company are entitled to claim for this money if there is a return on the company's paid up capital. Therefore the whole sum must be returned to the company and not just the amount RM3m agreed to in the consent judgment. In think the argument makes good business sense. The company cannot just forgo or write off a sum of RM13m owing to it by the directors by entering into a consent judgment without any sanction in the form of shareholders resolution obtained at a general shareholders meeting or a shareholders extra general meeting specifically held for the purpose. I think that even with the consent judgment any minority shareholders may take out a derivative action to demand for the return of the full sum owing to the company if the directors (in this case the four defendants) refuse to take such action. The money belongs to the company (and hence every shareholder may have a beneficial interest in it). It must be returned to the company unless there is a shareholders' resolution to do otherwise. To refuse the order merely on the basis of the consent judgment (without any shareholders' resolution to authorise the entering of such judgment — that resulted in the loss of RM13m cash to the company) would encourage similar practice in the future; and the errant directors may got off the hook and not answerable to the shareholders with impunity. This would certainly send the wrong message to the public and investors. The investors would need to be wary of putting money in a company where unlawful or unauthorised loans or advances to the directors may be simply written off by entering into a consent judgment and the errant directors are not held accountable for the loss caused to the company

[61] To avoid awarding double damages or double recovery the court, under its inherent jurisdiction, can exercise its discretion by making the necessary order to do justice to the parties or to prevent abuse of its process (see: *Emmerton v University of Sydney* [1970] 2 NSWR 633; and *Patterson v Veitch*

(1956) 58 SRNSW 287). In any event, in our present case, the respondent had amended prayers (5)–(6) in its originating summons, to take into account the settlement order entered into in the 1168 Suit. Thus, there is obviously no double recovery.

[62] Notwithstanding the settlement sum of RM3m, this does not detract from the fact the respondent has determined that there was a breach of the financial assistance provisions in the LR through the wrongful payment of RM16m. The respondent's direction for the return of RM16m to Cepatwawasan still stands, but now, subject to any monies actually paid back to Cepatwawasan pursuant to the settlement order in Suit 1168 (ie RM3m).

[63] The appellants, notwithstanding any private settlement between the relevant parties, had acted in breach of the LR and the respondent, performing its statutory duty to act in the public interest, had imposed sanctions or penalties for the appellants' breaches.

[64] The issue of duplicity of proceedings was also touched by the parties. This relates to the 1168 Suit and the present originating summons by the respondent under s 360(1)(c) of the CMSA 2007. We are of the view that this issue should not arise at all. The cause of action in the 1168 Suit is totally different from the present originating summons. The action in the present originating summon is not about an accrued right. It is a fresh proceeding. So, there cannot be any duplicity of proceedings.

[65] Section 11 of the CMSA 2007 clearly sets out the respondent's statutory duty to act in the public interest with particular regard to the need for the protection of investors. Section 11(2)–(3) provides:

> (2) It shall be the duty of an exchange to ensure, so far as may be reasonably practicable, an orderly and fair market in the securities or futures contracts that are traded through its facilities.
>
> (3) In performing its duty under subsection (2), the exchange shall—
>
> (a) act in the public interest having particular regard to the need for the protection of investors; and
>
> (b) ensure that where any interest that it is required to serve under any law relating to corporations conflict with the interest referred to in paragraph (a), the latter shall prevail.
>
> (4) It shall be the duty of the exchange to take appropriate action as may be provided for under its rules for the purpose of monitoring or securing compliance with such rules.

[66] Public interest is best served by the respondent directing the return of

the monies paid out in breach of the LR. Notwithstanding the settlement between the parties in the 1168 Suit, public interest and investor's confidence must be protected by ensuing that the respondent can still take action to rectify the breach by directing the return of the monies wrongly paid out. The respondent's action based on a breach of the LR does not overlap with the 1168 Suit's cause of action. Therefore, in continuing to maintain the direction that the monies are to be repaid, the respondent is merely carrying out its statutory duty under the CMSA 2007 and enforcing the principles of the LR.

CONCLUSION

[67] We are satisfied that the respondent had filed its application for the various orders in the originating summons in court through the proper procedure ie under s 360(1)(c) of the CMSA 2007. We are also satisfied that based on the evidence that the listing committee had made specific findings on all the appellants, which were later affirmed by the Appeal Committee of the respondent as well as from the facts disclosed in the supporting affidavits to the application the respondent had created sufficient 'appearance' to the eye of the court that the appellants had contravened the relevant LR (as discussed above) and consequently, the court had correctly exercised its discretion to make the various orders as prayed for by the respondent under the relevant provisions of the LR. We find no reason to disturb those findings.

[68] We therefore dismiss the appeal with costs of RM20,000 to the respondent. We also make an order that the deposit in respect of this appeal be paid to the respondent towards account of costs.

Appeal dismissed with costs of RM20,000.

Reported by Kohila Nesan